CHAPTER SEVEN

MANAGEMENT OF EMERGENCY DRIVING OPERATIONAL RISKS

Chapter 7

Management of Emergency Vehicle Operational Risks

Part 1 - The Legal Underpinnings Of The Risk Management Process

In our media conscious society, law enforcement and public safety organizations face increased scrutiny of their vehicle operations. Much of what has been termed "media sensationalism" has come about due to a variety of factors including victim outrage and high dollar civil judgments. To understand the need for reform in emergency vehicle training and the concept of law enforcement risk management requires a new focus on the impact emergency vehicle operations may have on the public we have sworn to protect. Law enforcement risk management is about both the protection of the public and the reduction of agency and officer civil liability. Once the fundamentals of liability exposure are understood, we can begin to build a protective structure which is the risk management process.

Emergency vehicle operations should be viewed as a high profile aspect of every agency's daily operations, much as the use of a firearm. In a very real sense, both automobiles and firearms can be deadly weapons. There has arisen a national consensus, reflected in recent court decisions, that increased scrutiny must be paid to emergency vehicle operations. There has been an outcry from the law enforcement and public safety community for more definitive operational guidance, as a matter of "front end" risk management. The foundation for such guidance rests on an understanding of the legal principles of agency and officer liability for injuries or property damage resulting from an emergency vehicle response.

The purpose of this chapter is to provide insight into the various legal theories which may come into play in lawsuits which were brought about by an emergency vehicle response. Understanding the basis of lawsuits is immensely beneficial in designing a mechanism to reduce agency financial exposure.

Whether the injury came about from alleged officer negligence in a non-emergency response mode, from injuries sustained through an intentional act in pursuit mode, or an agency's failure to provide adequate policy or training, officers must be aware of the potential for liability based upon their acts. Likewise, from a public trust and risk management standpoint, public safety executives and risk managers must understand that victim outrage and high dollar civil judgments are not aspects of our society for which there is no controllable cause. The management of risk exposure, litigation, and its associated expense, and the maintenance of the public trust can only be based upon a comprehensive understanding of the law related to emergency vehicle operations.

The Bases of Liability for Emergency Vehicle Operations

Lawsuits involving emergency vehicle operations will be brought in either state court or federal court. Actions brought in a state court, commonly called "tort"[1] actions, are usually brought in a court of general civil trial jurisdiction such as a District, Circuit or County Court. They are invariably courts which have the authority to hear and decide actions brought by private parties (as opposed to those actions brought by the State, such as criminal actions). Actions brought in the state courts under state tort law will not, of necessity, involve violations of federal constitutional rights. Actions brought under Title 42, section 1983 of the U.S. Code (hereinafter § 1983), whether in state court or federal court, will involve violation of a federally protected constitutional or statutory right. Whether a cause of action is based on state tort law or on § 1983, the plaintiff must establish responsibility on the part of the emergency vehicle operator or the employing agency. Responsibility of the operator is typically based on an allegation of negligence, or some greater degree of culpability such as a so-called "intentional tort." Responsibility of the employing agency may be based upon a failure to provide meaningful policy or adequate training. However, under state law in many states, merely employing an officer who commits an act of negligence can constitute a basis for agency liability under a theory called *Respondeat Superior*. This theory of recovery is not available under § 1983. As will be developed later, § 1983 is not an appropriate cause of action for an injured party where a federal law enforcement officer caused the injury, because §1983 is limited in application to persons acting under apparent "authority of state law."

State Tort Actions

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Actions brought against an officer or the employing agency under state law are generally based on allegations of negligence. The legal formula for negligence can be summarized as follows:

1. A duty or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

2. A failure on the person's part to conform to the standard required; a breach of the duty.

3. A reasonably close causal connection between the conduct and the resulting injury. This is known as "legal cause," or "proximate cause," and includes the notion of cause in fact.

[1]A tort is generically defined as an injury to the person or property of another for which the injured party may recover damages or other relief from a court of law.

4. Actual loss or damage resulting to the interests of another.[2]

Negligence in an emergency vehicle scenario generally results from one of the three following omissions:

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1. Violation of a state statutory provision which creates a duty to act or not act

2. Violation of department policy which creates a duty to act or not act

3. Violation of a general duty to use "due care."

The term "duty" means that there was some real obligation to behave in a particular fashion towards the person who was injured. The law recognizes generally that if there was no duty to the injured, then there can be no responsibility for payment of monetary compensation, known as "damages," or other relief to the injured party. Particularly egregious violations of an owed duty may result in liability under §1983 for either the officer or agency concerned.

Whether a lawsuit is filed against an officer or agency may be determined by the presence of tort claims legislation in the state concerned. Similar limitations on suits are present under the Federal Tort Claims Act, where a federal government agency or actor is alleged to have been negligent. The effect of tort claims legislation is generally to limit the amounts which may be recovered for injury, or to limit the available defendants in a lawsuit. The purpose of state tort claims acts is to limit litigation, by encouraging settlement of claims in advance of filing suit. Where the filing of a lawsuit occurs, nonetheless tort claims legislation may limit the number of available defendants and the amounts recoverable. A common attribute of many state Tort Claims Acts is that intentional or criminal action or inaction is frequently excluded as a basis for recovery. This is the case under the Federal Tort Claims Act as well. In situations involving such behavior, the injured party may only recover by filing suit. At the time the suit is filed, the injured party becomes known as the "Plaintiff" or "Complainant."

A Brief Overview of a Typical State Court Lawsuit

In the typical state tort action, the Plaintiff alleges some variety of negligence on the part of the officer, or officers, involved in the emergency vehicle operation which has "proximately" caused[3] the Plaintiff's

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[2]Prosser and Keeton on the Law of Torts, (5th Ed.; 1984)

[3]The term "proximate cause" is an important concept in American tort law. It means that there is a close causal connection between the actions of the alleged "wrongdoer," legally known as the "tortfeasor," and the injury suffered by the Plaintiff.

injury. This allegation is set forth in a legal document known as a Complaint, a Petition, or some similar document. The party being sued, the "Defendant," is afforded the opportunity to answer the Complaint or Petition within a certain number of days or be declared "in default." Being in default means that the court, in many states, may award the Plaintiff the relief requested in the Complaint or Petition without further hearing on the matter.

The Defendant has the opportunity to provide a response to the Plaintiff. This is done in a document known as the Answer. In the Answer, the Defendant may also raise counterclaims against the Plaintiff, or crossclaims against other persons who are felt to be responsible for injuries which occurred. Where the Defendant files a counterclaim, the Plaintiff is allowed to file an additional document known generally as a Reply, to address the Defendant's assertion of fault on the Plaintiff's part. All the documents mentioned above are collectively known as "pleadings."

Once the pleadings have been filed and served on opposing parties, each side to the lawsuit will engage in a process known generally as "discovery," as permitted by the applicable state Rules of Civil Procedure. The Rules of Civil Procedure are contained in a volume of the state code of laws and govern what items of information are required to be disclosed to the opposing party, when they are to be disclosed, and the remedy for failing to disclose. Many states have fashioned their discovery rules and their Rules of Civil Procedure after their federal counterpart. Discovery is a critical part of the lawsuit, and many cases are settled or dismissed based upon what has been discovered by the opposing party.

If the parties get beyond the Discovery process without settlement or dismissal, each party then typically files a variety of Motions. Motions are requests directed to the court asking it to order relief without submitting the matter to trial either before the court or by a jury. Motions may be addressed to some procedural aspect of the case, such as a Motion to Extend Discovery, or to some substantive aspect, such as a Motion to Dismiss or a Motion for Summary Judgment. In all events, the motion stage of the proceeding is critical for sorting "the wheat from the chaff" and allowing the court to deal only with the matters which should require its attention at trial.

After motions have been completed and ruled upon, the final stage of the proceeding is the trial. The burden is upon the Plaintiff to show by a "preponderance of the evidence"[4] that the Defendant has caused the injury for which the Plaintiff is seeking recovery. Typically the Plaintiff will choose between a trial by a jury or by the bench (i.e., by the judge without a jury). The process of deciding whether to choose trial by jury over trial by the bench is a complicated one, which is far too extensive for discussion in these materials. Where trial is by jury, the jury will decide the facts in the case and

[4]This is the general civil standard of evidence which must be satisfied by the Plaintiff in order to be awarded relief by the court. Generally the term means that the Plaintiff must show that it is "more likely than not" that the Defendant is responsible for the injuries.

the judge will decide all legal issues. When the trial is by the bench, the judge decides all issues, both factual and legal.

In the typical negligence action, the issue of "damages" becomes central. The term refers to the amount of money which the court will award to the Plaintiff, or to the Defendant as a matter of Counterclaim, to compensate for an injury. Monetary damages are generally said to be either "compensatory" or "punitive" in nature.[5] There are some limitations on when punitive damages are appropriate, and against whom. Punitive damages are not appropriate where the Plaintiff's injury was caused merely by the "simple" negligence of a law enforcement officer or a municipality.[6] Compensatory damages are awarded to "make the person whole"; in other words, to compensate the injured party for the injury suffered at the hands of the wrongdoer. Compensatory damages may cover such matters as medical costs, lost wages, prescription costs, pain and suffering and loss of the company and association of the injured party by a family member.[7] In the typical jury trial, the jury will determine the appropriate amount of compensatory damages, whereas the issue of punitive damages is sometimes, depending upon jurisdiction, decided by the judge.

42 USC § 1983 Actions

From the standpoint of a state or local law enforcement officer or municipalities[8], section 1983 (we shall use the typographical symbol "§" to denote "section") actions can be especially devastating from both a financial and public confidence standpoint.

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[5]Some states use the terms "nominal" or "actual" to describe compensatory damages. In either event, the concepts are the same. Punitive damages, as the name implies, are assessed to punish a wrongdoer and typically have no logical relationship to compensatory damages. Thus, it is not unusual to have compensatory damages of, say, $10,000 and punitive damages of $100,000 or more!

[6]The rules concerning award of punitive damages very from state to state. Some states may allow award of such damages where the behavior of an officer can be shown to be "grossly negligent," whereas in others, punitive damages may not be appropriate unless "recklessness" can be shown. In suits brought under 42 USC § 1983, punitive damages cannot be awarded against a municipal defendant. This same applies in some state court proceedings as well.

[7]This latter type damage, loss of association, is commonly known as "loss of consortium."

[8]For purposes of § 1983 discussion, the term "municipality" includes all units of local government at lower than the state level. The most common of these are cities and counties.

There has been much written about § 1983 and yet, for the most part, law enforcement officers and administrators remain somewhat unclear regarding the application of the section and how it may come to impact them.[9]

The language of Title 42, United States Code, section 1983, frequently called the "Federal Civil Rights Act," is amazingly brief. The section states, in pertinent part:

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> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....*

Thus, § 1983 creates no rights in and of itself but merely provides a remedy for violations of rights secured by either the United States Constitution or the "laws" of the United States. It has only two operative requirements:

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1. That a violation of a federal constitutional or statutory protection occur; and

2. That the person committing the violation be a person acting "under color of" state law

Where municipal law enforcement officers are involved, actions undertaken in the course and scope of duty will virtually always satisfy the second requirement, as the authority to arrest and exercise the myriad of other law enforcement functions derives from state constitutional or statutory empowerment. Interestingly, § 1983 does not apply to injuries inflicted by persons acting under the apparent authority of *federal* law, absent some state law connection. The history of the statute will show that § 1983 was enacted by the U.S. Congress in 1871 as a means of ensuring that newly emancipated slaves were not deprived of their constitutional protection by the secessionist states

[9]Typically, law enforcement officers and administrators think of § 1983 in terms of federal court proceedings. The § 1983 action, however, can be brought as an action in state court as well. The substantive aspects of state and federal court § 1983 actions are identical. Some procedural differences may exist in terms of motions, discovery and various other aspects of the lawsuit which are controlled by state rules of civil procedure. For our purposes, however, we will discuss § 1983 as a federal court proceeding.

themselves. In fact, the law was originally referred to as the "Ku Klux Klan Act," although it has seldom been used against their activities.

The Application of § 1983 to Law Enforcement Activities

From the time of § 1983's enactment it was relatively unused until the United States Supreme Court decided *Monroe v. Pape* (365 US 167) in 1961. *Monroe's* holding, that the term "persons acting under color of state law" was applicable to municipal police officers although not directly applicable to municipal corporations themselves, started a trickle of lawsuits against law enforcement officers which came to full stage in 1978 in *Monell v. Department of Social Services* (436 US 658). In *Monell,* the Supreme Court overruled *Monroe* to the extent that it had held municipalities not to be "persons" within the meaning of §1983. After *Monell,* litigation floodgates opened for suits against municipalities whose "policies, customs or practices" could be said to be the "moving force" behind constitutional or federal statutory violations against their citizens. The swelling stream of §1983 litigation against municipalities finally reached torrent levels after the US Supreme Court's 1989 decision in *City of Canton v. Harris* (489 US 378). No single case has become so critical to the management of municipal law enforcement risks, particularly those associated with emergency vehicle operations, especially pursuit. The aftermath of *City of Canton* and its impact on section 1983 litigation against municipalities, in particular, is frightening history.

Types of Liability Under § 1983

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As a broad proposition, liability under § 1983 falls into three categories:

1. Individual, or personal, liability of the law enforcement officer

2. Vicarious[10], or indirect, liability of a supervisor

[10]The term "vicarious liability" has spawned disagreement among legal practitioners as to its specific meaning. Some practitioners use the term to refer to a common law theory of imputed negligence otherwise known as *respondeat superior*. This theory requires no showing of fault on the part of an employing agency, but rather assigns (i.e., "imputes") the negligence of the employee to the employing agency for liability purposes. This theory of recovery is not available under § 1983, but is available in many state court proceedings. We here adopt the meaning of "vicarious" shared by the other school of thought, which denotes vicarious liability as a type of indirect liability for the acts of a subordinate where a superior, usually a supervisor, has through some gross negligence of his or her own, or through participation in the subordinate's activities, allowed injury to occur. We specifically do not refer to *respondeat superior*.

3. Municipal liability

Individual Liability

Individual officers frequently express concern over the exposure of their personal assets in a lawsuit where their personal activities are alleged to have caused a Plaintiff's injuries. For the most part, the Plaintiff alleges that some variety of negligence or intentional wrongdoing of the officer has caused compensable injuries.

In state court, a Torts Claims Act may provide some insulation to the officer where simple negligence is alleged. Even where there is a finding of gross negligence on the officer's part; if the actions complained of are within the course and scope of the officer's duty, the resulting judgment will virtually always be paid by the employer or its insurance carrier. The reasons for the decision of the employer or carrier to pay the judgment are too wide and varied for discussion here, but typically center around principles of public service and policy.

In § 1983 actions, however, the basis of individual officer liability is somewhat more complicated than in a state tort action, and requires a basic understanding of how the § 1983 cause of action relates to emergency vehicle operations.[11] After the discussion of § 1983 claims in emergency vehicle operations, we will discuss the bases for vicarious and municipal liability.

Section 1983 Constitutional Claims in Emergency Vehicle Operations

Although the expression "emergency vehicle operations" may encompass non-emergency or emergency response and pursuit activities, § 1983 lawsuits have generally focused on emergency response and pursuit activities. Traditionally, non-emergency vehicle operations have been the focus of state negligence claims. To understand how the § 1983 action is set out in an emergency vehicle operations case, one must recall the two operative requirements for § 1983 set out earlier in this section.

1. That a violation of a federal constitutional or statutory protection occur;

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[11]Beyond the individual officer's concerns with state or federal civil liability are issues which may arise with respect to allegations of criminal wrongdoing. The individual officer may face criminal liability under federal criminal civil rights statutes such as 18 USC § 241 or § 242, criminal proceedings in state court under state criminal statute or, in some states, under state common law. The discussion in these materials relating to litigation file preparation has general application to an officer in such a situation. Agency assistance, however, may not be readily available to an officer pending criminal prosecution, and the services of competent private legal counsel should be enlisted.

2. That the person committing the violation be a person acting "under color of" state law.

For the moment, discussion of the first requirement is critical, with a concentration on violations of constitutional protection.

Constitutional Violations In Emergency Vehicle Operations

A federal constitutional violation cannot occur unless the injured party has constitutional protection. While this statement may seem overly simple, it is a critical concept in understanding how liability attaches, or does not attach, to law enforcement emergency vehicle activities. Federal constitutional protections are laid out in the Bill of Rights, which consist of its first ten amendments to the Constitution, and the Fourteenth Amendment, which makes the first ten amendments applicable to the states. If a Plaintiff alleges that a violation of constitutional rights occurred, the protection must be found either in the Bill of Rights, the Fourteenth Amendment, or in the courts' interpretations of those rights. The mere fact that injury occurs to the Plaintiff and that there was law enforcement involvement in the set of circumstances out of which the injury arose is insufficient to attach liability to the law enforcement officer or agency. There must have been some duty on the part of law enforcement towards the Plaintiff, whether the duty was to act or to refrain from acting. If there was no duty (no "special relationship" to the Plaintiff), there can be no liability. At the present time, the vast majority of emergency vehicle constitutional claims under § 1983 are brought under either the Fourth or the Fourteenth Amendment. These claims differ significantly from each other and are based, in large part, on the identity of the Plaintiff as suspect or innocent third party. Unlike state tort actions, § 1983 claims generally require a degree of "fault" greater than simple negligence if the action is to go forward.[12]

Fourth Amendment Claims

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The Fourth Amendment to the United States Constitution prohibits, among other things, "unreasonable" searches and seizures. From the standpoint of emergency vehicle claims, we need only concentrate on claims for unreasonable "seizures." This claim is typically brought by a suspect who has fled from law enforcement and suffered injury as a result. Because Fourth Amendment

[12]This is an oversimplification inasmuch as the United States Supreme Court has ruled only that substantive due process claims under § 1983 cannot be supported by an allegation of simple negligence (see *Davidson v. Cannon* and *Daniels v. Williams,*1986); footnote 8 of *City of Canton v. Harris* clearly sets forth the court's reluctance to address the operative degree of fault required to establish an underlying violation, although general consensus is that mere negligence will likely be held insufficient.

claims require that a "seizure" occur. Because of the definition of seizure given by the US Supreme Court in such cases as *California v. Hodari D.* (__US__, 199_), Fourth Amendment claims will typically arise only where a pursuit has occurred. For purposes of illustration, it may be helpful to take a look at how such a claim arises.

Although there have been few cases decided on a pursuit factual basis by the US Supreme Court, there is a wealth of cases which have dealt with the issue of seizures, especially by deadly force. Perhaps the most important of these is the 1985 decision in *Garner v. Tennessee* (471 US 1) which essentially sounded the death knell for the so-called "fleeing felon" rule. That rule had allowed a law enforcement officer to use deadly force, typically a firearm, to stop the flight of a fleeing suspect where the suspect, having committed a serious crime (i.e., felony), refused to stop on police demand. The Court, noting the development of the concept of "felony" from the English common law to its present day iteration, ruled that in present day society, where the classification of "felony" is no longer reserved solely for capital crimes (as it had been at Common Law), use of deadly force is an inappropriate means of stopping a non-dangerous fleeing suspect. At the time of the *Garner* decision many jurisdictions classified various non-dangerous offenses as felonies. As an example, in South Carolina, the crime of "Peeping Tom" was classified as a felony punishable by up to three (3) years imprisonment, but the crime of Assault and Battery of a High and Aggravated Nature was classified as a misdemeanor, punishable by up to ten years' imprisonment! The upshot of the ruling in Garner has been that law enforcement agencies are now required to operate under a "two pronged" analysis before using deadly force against fleeing suspects. Specifically, an officer electing to use deadly force must now answer both of the following questions affirmatively before deadly force usage is authorized under *Garner:*

1. Does the fleeing suspect against whom deadly force usage is considered pose a "significant threat" to members of the public if immediate apprehension is delayed?

2. Is there any reasonably available lesser means of stopping the flight of the suspect, besides deadly force?

In 1989, the US Supreme Court addressed the issue of the constitutional limitations of deadly force in a pursuit situation. The decision was called *Brower vs Inyo County* (489 US 593). *Brower* has become important for its recognition that certain pursuit tactics may result in a claim of constitutional violation through a seizure by deadly force. The facts of the case are that a suspect in a stolen car was being pursued at high speed by deputies of the Inyo County, California, Sheriff's Department. The chase terminated when the suspect collided with a roadblock, consisting of an 18-wheel tractor-trailer rig pulled across both lanes of a two-lane highway just beyond a blind curve. A police cruiser had been parked on the shoulder of the roadway near the tractor-trailer with its high-beam headlights aimed at the suspect's eye level in an effort to blind the suspect and conceal the fact of the roadblock. The court held that a "seizure" by deadly force, for purposes of the Fourth Amendment, had occurred, and sent the case back to the lower court to determine whether the seizure was unreasonable.

The *Brower* ruling relied heavily on the holding in *Garner* to point out that whether a suspect in a pursuit case could be seized by use of deadly force would depend upon the nature of the offense for which pursuit was initiated and the danger which the suspect posed to the public.

The net impact of *Brower* is that a seizure by deadly force, such as by ramming, discharge of a weapon or other contact method, will not likely be permitted for minor nondangerous offenses such as traffic violations, where the suspect's driving does not pose a "significant threat" to the public (to include the officer). This point becomes critical in discussions of pursuit tactics, policy development and training, and their relationship to the policy.

Fourteenth Amendment Claims

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Whereas Fourth Amendment claims are typically raised only by suspects in pursuit cases, Fourteenth Amendment claims are generally brought by innocent third parties who are injured in either pursuits or in emergency response situations. This cause of action under § 1983 alleges usually that the Plaintiff has been deprived of "due process" protection under the due process clause of the Fourteenth Amendment. The pertinent language of the Fourteenth Amendment states:

> *"No State shall ...deprive any person of life, liberty, or property without due process of law..."*

The term "due process" is a nebulous one in the law. It may be spoken of in terms of "substantive due process" or "procedural due process." For our discussion purposes we will focus on the so-called "substantive" aspects, meaning that we will look at those situations where a person has been deprived of "life, liberty or property" itself as opposed to the right to have a hearing prior to deprivation by the government.

Situations where an innocent motorist is struck by a fleeing suspect or law enforcement vehicle in pursuit or in emergency response mode are perhaps the most tragic situations imaginable for law enforcement professionals. The idea that an innocent person is made to suffer runs contrary to the law enforcement mission to protect and serve. Injury to third parties will be balanced by a court against the duty owed to those persons by law enforcement. It is this "duty" concept which underlies Fourteenth Amendment claims. If there is no duty on the part of law enforcement to act or refrain from acting with respect a particular individual, then any injury which may result to the individual from law enforcement activity or inactivity legally will not result in liability. This proposition frequently causes concern on the part of law enforcement officers who, for example, feel that they have a *duty* to pursue. To understand the duty concept, it may be helpful to use a practical illustration before undertaking further analysis.

Suppose that a law enforcement officer observes a man swimming toward shore in a rain- swollen river. In the course of swimming, the man becomes fatigued and begins to drown. The law enforcement officer has a coil of rope in the trunk of his cruiser, but elects not to retrieve it and instead gets into his car and drives away. Should liability be imposed upon the officer for failure to attempt a rescue? Morally, we would likely all agree that the officer owed a "duty" to the drowning man. Legally, however, the duty question must be framed quite differently. Absent a so-called "special relationship" between the officer and the drowning man, there is no legal duty, in the majority of jurisdictions, to render rescue. This result comes about because of the widely-accepted rule that a law enforcement officer's duty of protection is to the public generally and not to a specific individual, absent a so-called "special relationship." This morality-legality dichotomy causes many officers a great problem when they feel the need to act from a moral or social responsibility basis, but subsequently find themselves sued for the decision to act. A classic example of this occurs when an officer is confronted with an apparently drunken driver weaving down the road at a low rate of speed. The initial inclination of some officers is that there is an immediate need and duty to pursue the driver, at all costs, even when the driver pulls away at an increased speed after being signaled to stop. But is there? It is critical to distinguish between the duty to pursue and a duty to take other possible steps to protect the public, just as it is important to distinguish moral from legal duty.

Analysis of liability under the Fourteenth Amendment due process clause focuses on this issue of duty. While the focus of the Fourteenth Amendment is on "constitutionally created duty," there are "nonconstitutional" duties which may also impact an officer's performance. Nonconstitutional duties are created generally in one of two ways: by state statute, or by agency policy. Neither state statute nor agency policy, however, can create a constitutional duty. The fashion in which a duty created by policy or statute is violated, however, may give rise to a constitutional claim if the behavior itself violated some constitutional protection envisioned by the Fourteenth Amendment.

Statutory Duties

Each state has a provision in its code of laws which specifies conditions under which a vehicle may be operated as an authorized emergency vehicle. Such statutory provisions lay out in general terms how an emergency vehicle may be exempt from state traffic laws when responding to an emergency or when in pursuit of an offender, and may create certain duties.

The most common duties created under state statute are the duty to utilize emergency warning devices, and the duty to exercise "due care." Most state statutes are based upon the language of the Uniform Vehicle Code, which allows the operator of an emergency vehicle to exceed the posted speed limit and generally disobey traffic directives if the operator exercises "due care" and utilizes lights and/or siren. Each law enforcement agency that wishes to exceed speed limits, or to otherwise disobey traffic directives, must comply with the statutory provisions. Beyond the bare guidance of the state statute, each agency must provide guidance to its officers in the form of policies and procedures. State statutes will not likely provide guidance on such critical matters as when a pursuit or emergency response can be initiated. These issues must be addressed in the agency's pursuit policy.

Policy-created Duties

An agency's pursuit policy is a directive for action to its officers. The joint purpose of the policy, and the procedure to implement it, is to identify for officers acceptable, as well as unacceptable, behavior in pursuit operations. The policies and procedures create certain duties for officers engaged in emergency vehicle operations to undertake, or not undertake, certain actions. The majority of jurisdictions do not tell their officers in their policies that they *must* pursue all violators, but rather leave the decision to continue or discontinue a pursuit to officer discretion, subject to agency policy guidance. Until 1989, many agencies across the United States took the approach that minimal written guidance to officers and the advisement to "exercise good judgment" were the preferable means for controlling the risks of pursuits. That year, however, the US Supreme Court delivered its opinion in *City of Canton vs. Harris* (as discussed above) and effectively served notice that a philosophy of "no policy is the best policy" could pose extreme liability problems for municipalities and law enforcement agencies where the actions of officers violated citizen constitutional protection.

Constitutional Duties

Above and beyond the guidance provided by state statutes and agency policy and procedure are the limitations and duties imposed by the United States Constitution, as interpreted by the courts. In 1989, the US Supreme Court in *DeShaney v. Winnebago County Department of Social Services* (___US___) effectively served notice that unless a special relationship exists between the government and an injured party - in other words that a governmental duty to the injured party exists - liability cannot attach, irrespective of the perceived moral obligation of the government or the outrageousness of its behavior.

Is there is a duty to pursue? An affirmative answer can only be forthcoming if there is either a state statutory mandate to pursue (there is none); or the agency pursuit policy mandates that officers pursue all violators (this is ill-advised and generally unlikely); or there is a constitutional duty to act

to pursue all violators (*DeShaney* clearly indicates not). Is there, however, a duty to take some step to prevent the previously mentioned drunken driving suspect from injuring the public? Certainly! Should law enforcement officers turn in their cruisers and badges and allow all suspects to escape? Hardly!

Inherent in the law enforcement oath to uphold the laws and to protect and serve is a duty to take steps to protect the public. Balanced against this apparent open-ended obligation, however, is a balancing test which courts will undertake where injury occurs. The balancing is basically this: Was the need to immediately apprehend the suspect so great that the risk posed to the public and the resultant injury justified the law enforcement action? Inherent in this analysis is the question of the reasonableness of the law enforcement officer's actions. In § 1983 suits, the standard for judging the reasonableness of individual officer behavior in Fourteenth Amendment "due process" claims has varied from one federal circuit to another. One federal court might rule that an officer's "grossly negligent" behavior in a pursuit could result in "due process" liability; whereas the same behavior in another federal court would be insufficient to trigger the threshold requirement of behavior which "shocks the judicial conscience." In summary, the balance of officer behavior against the need to immediately apprehend varies significantly from federal circuit to federal circuit.

Revisiting Individual Officer Liability

Individual officer liability typically comes about where the officer's behavior exceeds the course and scope of duty or constitutes intentional violation of agency policy. Law enforcement officers are generally protected under a concept known as "qualified immunity," sometimes erroneously called "good faith immunity," for their actions in the course and scope of their duty. This concept allows officers to avoid individual liability where their actions do not violate "clearly established law." What may be considered as "clearly established" is not clearly established under current US Supreme Court guidance, but it is generally safe to say that an officer whose actions in compliance with policy result in injury to a third party or suspect will not likely be held personally liable unless the policy was known by the officer to violate well-established law.

The officer's actions in the course of an emergency response or pursuit will be critical initial indications of the potential liability which may later come about. If the officer's conduct in the course of a pursuit is such that it violates agency policy, there remains the question of whether the violation is merely "negligent" (i.e., unintentional, but lacking in the exercise of "due care"); or "intentional" or "shocking to the conscience" (i.e., intending the resultant outcome of the behavior; or foreseeably certain to result in the injury). The answer to this question can shape the character of the suit which is filed. If the officer's conduct is violative of policy solely through the failure to exercise due care, the resultant Plaintiff's claim will likely be brought under the state's tort claims act or ultimately filed as a state court negligence action. If, however, the violation of the policy is intentional (i.e., the officer knew that ramming of a suspect vehicle for less than dangerous felony offenses was prohibited, but

consciously made the decision to do so anyway), or the officer's behavior in violating the duty created by agency policy rose to the level of a constitutional due process violation, then the Plaintiff's claim will likely focus on § 1983 as a remedy. This result comes about based on our earlier discussion regarding the general non-availability of § 1983 for simple negligence claims.

Vicarious Liability

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Once the basics of § 1983 liability are comprehended, vicarious or indirect liability can be understood by the simple concept that a supervisor or other officer cannot, with impunity, allow a subordinate, to whom a duty of supervision is owed, to commit constitutional violations or take part in the unconstitutional behavior either through direct participation or ratification. A classic example of this concept is the liability which attached to the inaction of the on-scene supervisor during the beating of Rodney King in Los Angeles in the early '90s. Vicarious liability under § 1983 will require, at a minimum, that gross negligence or greater culpability be attendant to the supervisory action or inaction. Where state law tort claims come about, the concept of *respondeat superior* may attach liability to the employer itself, where permitted under state law. Recall, however, that *respondeat superior* (which is liability based upon the mere employment of the officer) is not a permissible basis of recovery under § 1983.

Municipal Liability

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From the standpoint of so-called "deep pockets" liability, municipalities and their insurers are greatly at risk. A municipal entity is not liable for the acts of its officers under § 1983 merely because it employs them. The officers' infliction of constitutional injury must have been in furtherance of the "policy,""custom" or "practice" of the municipality before the treasury of the municipality is exposed. "Policy" may be deemed to exist in a number of ways. Written policies and directives may be indicative of the municipality's "causation" of a Plaintiff's injury through its officers, but often the injury suffered cannot be directly attributed to anything in writing, although it is well-known that "It's always been done that way." In such situations, development of a history of constitutional violation by the offending agency's officers can suffice to establish the custom or practice by the Plaintiff. For purposes of municipal liability, however, mere establishment of a policy, custom or practice is not enough to impose liability. The policy, custom or practice must have been such as to have proximately caused a deprivation of the Plaintiff's constitutional rights (or federal statutory protection). In our previous discussion of § 1983 liability for pursuit and emergency response activities, we identified the Fourth and Fourteenth Amendments as significant sources of constitutional protection for Plaintiffs, and as significant limitations on an agency's emergency vehicle operations. At this point, some discussion is necessary regarding how violations of constitutional protection can impose liability on a municipality. Specifically, we must discuss the impact which *City of Canton v. Harris* has had on law enforcement emergency vehicle policy, operation and training. At the conclusion of this chapter we will discuss *Canton* and its impact on risk management for law enforcement emergency vehicle operations.

City of Canton v. Harris

In 1989 the US Supreme Court effectively served notice that municipalities and their law enforcement agencies must be accountable for the critical law enforcement functions of their officers. The *Canton* case, on its facts, is not related to emergency vehicle operations, but the court's holding and the language of the now famous "footnote 10" are fundamentally important to protecting the public and officers alike. The *Canton* case was a § 1983 action commenced by a woman who suffered "severe emotional distress" after being arrested by officers of the Canton, Ohio, Police Department. The substance of her claim related to an alleged failure to provide her medical attention when she was booked into a detention cell at police headquarters. In essence, Ms. Harris's complaint was that she was deprived of her due process right to medical attention by the city because there was inadequate training of intake officers to recognize when an arrestee was in need of medical care. Ms. Harris was taken to the emergency room of the city hospital upon her bonding out and was admitted to the hospital for treatment and, after release, was treated on an outpatient basis for a significant time period. The court, in analyzing her claim, noted that certain law enforcement activities require meaningful officer training if members of the public are to be protected against constitutional injury. Of critical importance to our discussion of emergency vehicle operations is the court's language in footnote 10 of the opinion. In describing law enforcement activities which require significant training, the court stated:

> For example, city policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 US 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are "deliberately indifferent" to the need.

The holding in *Canton* is that municipal policymakers must be cognizant that certain activities of their law enforcement officers run the great possibility of causing injury to citizens if officers are not trained in the performance of the activities. While footnote 10 discusses the use of deadly force under *Garner*, responsible inquiry by law enforcement administrators must be into all law enforcement activities which expose the public, and officers themselves, to extreme risk of injury if not properly carried out. From a statistical standpoint, we would all likely agree that a law enforcement officer is much more likely to engage a suspect in pursuit than to discharge a firearm (other than for training or animal humane purposes) during a career. Yet, the predominant focus of law enforcement policy and training has been on firearms usage. Likewise, law enforcement administrators have traditionally focused on firearms as the virtually exclusive means of inflicting deadly force. Recently, cases like

Brower (discussed above) have caused us to reevaluate our pursuit operations as potential deadly force applications.

The bottom line for municipal law enforcement is that if a failure to provide policy and training to officers in "critical functions," such as emergency response and pursuit, can be classified as "deliberate indifference" to the constitutional rights of members of the public and constitutional injury occurs; then municipal liability will likely attach.

Liability for State Officers

A fundamental question unanswered in the foregoing discussion is the liability exposure faced by officers employed by state law enforcement agencies. This area is of critical importance because of the general proposition that neither a state nor its officers, who are acting in "official capacity," can be sued in federal court, or for that matter in a state court upon a federally based cause of action such as 42 USC § 1983 (See, e.g., *Will v. Michigan Department of State Police*; ____ US ____; 1989). This prohibition, however, is not an ironclad protection against any lawsuit for state officers, to include sheriffs and their deputies who may be classified as "state actors" under the laws of their respective states. A state claim based upon negligence, or some variation thereof, can have application against virtually any state or local officer.

From the standpoint of § 1983 exposure, however, liability can attach against a "state actor" only in that officer's personal capacity. Distinguishing what constitutes an official capacity act from that which constitutes a personal capacity act can prove tricky. It should also be noted that, as a practical matter, a Plaintiff will likely allege in the Complaint that the acts of the officer which resulted in injury occurred in the officer's personal capacity. Because of the extensive effort which must be expended in the course of pretrial discovery to identify whether the acts were actually personal or official capacity, an insurer will likely intervene to defend the officer. While such an approach by Plaintiff's counsel may appear to be unfair in some clear-cut instances, the reality is that it frequently is utilized to tap into the pocket of the employing governmental entity. Therefore, as a practical measure, state officers may take little solace in the protection purportedly afforded them and, as an operational concern, should tailor their conduct accordingly.

Part 2 - Risk Management and Liability Reduction

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Risk Management: Definition And Benefit

The concept of protecting oneself by taking appropriate precautionary steps before embarking on a potentially hazardous undertaking is neither novel nor earthshaking. It is a commonsense proposition. Most of us would agree that the better we prepare ourselves for a likely adverse

eventuality, the better we will be able to deal with it should it occur. In its most basic form, this is an operating definition of the concept known as risk management. The goal of effective risk management is to accurately and prospectively identify *potential* hazards, prior to their occurrence, and to put into place reasonable and cost-effective, protective measures which will prevent the hazards from becoming *actual*, or at least catastrophic, occurrences.

To understand the benefit of effective risk management requires that we understand that being unprepared for hazards has financial, operational and emotional impact both on law enforcement agencies and the governmental entities they serve. Financial and emotional hardship may also be caused to the members of the public officers have sworn to protect and serve. In some agencies there is a smug and erroneous perception that, once an incident has occurred, law enforcement operational exposures are an insurance company's problem. Such a shortsighted approach ignores the fact that insurance premiums are borne by the agency either directly or indirectly through its budget allocation. Perhaps the best justification for effective law enforcement risk management measures is the budget savings which can be reallocated, away from law enforcement liability or automobile insurance premiums, to critical law enforcement needs such as increased personnel, new equipment or funding for training.

"Front End" Risk Management

Risk management for law enforcement agencies should be what is called a "front end" proposition; that is, it should be put into place well in advance of the occurrence of the contingencies which invite hazards, so that adequate steps can be taken to provide protection. Unfortunately, we do not live in an ideal world. Risk management must sometimes take an "after the fact" approach; which many of us might colloquially refer to as "damage control". We will address here both "front end" and "after the fact" risk management. In order to understand the application of these concepts, a short look at the principle of risk management is necessary.

Basic Principles of Risk Management

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Risk Management is an ongoing process which consists of four basic steps

Step 1

Identifying the hazards or potential hazards which face an organization. These hazards and potential hazards are commonly referred to as "exposures." Exposures can vary widely from such concerns as an inadequate training budget to outdated equipment.

Step 2

Determining the means of reducing (i.e., eliminating or curtailing) the identified exposures. These means must be realistically within the capability of the organization. Examples of exposure reduction might include increasing the amount of training provided in certain "critical function" areas (such as EVO), reviewing the organization's progressive discipline policy, or revising the organization's pursuit policy in light of recent court decisions.

Step 3

Implementing appropriate measures for reduction of exposure. This is the logical follow- through to step 2 and may include the use of such risk management processes as policy development, training, post-incident reporting requirements and enhanced public relations efforts.

Step 4

Monitoring the effectiveness of the selected exposure reduction measures and implementing changes as appropriate. This step requires recognition that the risk management process is not a onetime undertaking, but a constantly evolving program which should be continually updated.

Identifying Exposure

In many respects this part of the risk management process is the most difficult. Any number of considerations may explain an agency head's reluctance to address the possibility that the operations or policies of the agency may be deficient or otherwise open to attack. Even where the agency head is willing to entertain the possibility, the logistical or financial aspects of an identification process may appear overwhelming. A number of options present themselves as means of identifying agency exposures. In the ideal setting, each law enforcement agency would undertake an objective and intensive self-study of its organization, staffing, operations, policies and procedures, insurance (to include workers' compensation) losses and litigation profile in order to accurately depict its state of exposure. Unfortunately, few agencies have the resources, financial or human, to undertake such a gargantuan effort. Some agencies, in the course of seeking agency professional accreditation, may successfully accomplish many of these tasks and gain significant insight into actual and potential exposures. However, the cost of participation in a nationally recognized accreditation program may be more than a small agency, or its municipality, wishes to. Still other agencies discover some of their actual exposure in a most unfortunate fashion; they are sued.

Somewhere between being sued and undertaking the ultimate self-study, there is an approach to exposure identification which will serve the needs of the "average" law enforcement agency. We will refer to this approach as the "critical functions" assessment.

The Critical Functions Assessment

Most law enforcement agency heads have a fairly accurate concept of where their agencies are likely to come under legal attack. While risk management, in a pure sense, does not deal exclusively with legal exposure, the ever-present potential for police civil liability places it towards the top of most agencies' list of exposures. From a national perspective, a handful of functions appear to present the greatest operational exposure for law enforcement agencies. The purpose of the "critical functions assessment" is to identify those functions performed by the agency which, because of their great potential for serious injury if improperly performed by officers, warrant review. A "critical function" may be one which does not occur frequently, but has great potential for injury, such as an officer's use of deadly force in attempting to stop a dangerous fleeing suspect; or it may be one which does occur with relative frequency and which has high potential for serious injury, such as an officer's vehicular pursuit of a stolen vehicle.

Law enforcement use of force, use of deadly force, and emergency vehicle operations, are three of the most significant operational exposures faced by agencies, because of their potential for serious or fatal injury, potential financial impact based on settlement or judgment, and foreseeability of occurrence. In evaluating liability exposure, an agency should review with its Risk Manager, City or County Manager, or other person responsible for tracking claims and lawsuits, the current and historical litigation status of the agency, to include settlement decisions. Such a review should help focus on current and past problem areas which may warrant increased attention. It is important to remember that the fact of a lawsuit does not, in and of itself, represent that the agency is deficient with respect to its treatment of an operational area. It does, however, serve to send up a "red flag" for an area which should be carefully examined individually and in conjunction with similar cases, in an attempt to discern whether a trend is developing.

Determining the Means of Exposure Reduction

The means of reducing identified exposure for law enforcement activities are as wide and varied as the creative minds of law enforcement officers. Risk management is not solely a proposal for Risk Managers. To the extent that a law enforcement officer is concerned about the welfare of fellow officers and serving the public, risk management is a matter for every member of the agency.

Exposure reduction can run the gamut from enhanced training programs, to individual counseling of a subordinate, to implementation of a progressive discipline scheme for violations of policy. Exposure reduction measures should not be directed only to actual

incidents which have already resulted in exposure. This approach would amount to nothing more than "damage control." Exposure identification must involve honest and intelligent projection of potentially problematic areas, based upon feedback from line officers and supervisors, and observed trends. Exposure identification will be driven somewhat by the idiosyncratic nature of the law enforcement function under review, and the legal and policy directives which address the area.

Implementing and Monitoring Exposure Reduction Mechanisms

Reduction of exposure cannot come about unless implementation and monitoring of exposure control occurs. This process of implementation is what is called risk control, or risk management. Technically, risk management refers to the entire process of identification of exposure through follow-up by monitoring. Regardless of the name we assign the process, unless there is follow-up to ensure that our selected mechanisms are working, the process of risk management will become nothing more than a senseless exercise. The monitoring process is a feedback mechanism and a system of verification. The same measure, taken in the initial step of the risk management process - identification of exposure - becomes once again critical for the monitoring phase of the process. The risk management process is an ongoing and continuous, if not circular, process which warrants constant updating.

Application Of The Risk Management Process To Emergency Vehicle Operations

Identifying Emergency Vehicle Operational Exposures

Determining exposure for an agency's emergency vehicle operations (EVO) involves agency review of historical loss data (both from a liability and workers' compensation standpoint), review of litigation (both pending and completed), and polling of line officers regarding issues arising in the course of vehicular law enforcement. Agencies should not rely solely upon examination of those EVO occurrences which result in property damage or personal injury. Exposure for EVO can come about through a "policy, custom or practice" of unconstitutional behaviors. Thus, although only a portion of EVO incidents may have actually resulted in personal injury, it is possible that a pattern of unconstitutional, or merely negligent, behaviors could be in place. While severe injury might arise from only one incident in the ongoing pattern of behavior, the exposure of a municipality could very well be based upon the pattern; whereas an isolated incident would not likely have implicated the municipality.

Perhaps one of the best mechanisms available for identifying EVO exposure, and identifying means of reduction, is the "pursuit after-action report," While many agencies require such reports when personal injury has occurred, or where there is the perceived likelihood of a

lawsuit, the better practice is to require them after each and every pursuit. In this fashion, an agency will be able to freshly document the specifics of each pursuit, thereby building a file to assist in litigation defense, and be able to counter allegations of a pattern, custom or practice which seeks to attach liability to the municipality. Another benefit is that this approach enables officers to learn from the specifics of their behavior, and to revise training as necessary to remedy problem areas which surface when the reports are reviewed.

Identifying Means of Exposure Reduction for Emergency Vehicle Operations

Identifying a means of reducing EVO exposure requires that we inquire into the variables which may have significant effect on the exposure. Where EVO is concerned, there are three major variables: environment, vehicle and driver. Collectively, these three could be called an "interactive triangle." Changes in one will likely affect the other two. Experienced EVO trainers recognize that control may be exercised over the behavior of only one corner of the triangle in the course of a pursuit - the driver. While law enforcement officers "control" their vehicles in the course of a pursuit, the reality is that the vehicle operates under strict principles of physical dynamics which the officer cannot alter. Wishing that a police cruiser would stop in a hundred less feet in order to avoid a collision does not change the physical behavior of the cruiser. Likewise, wishing that a sudden rainstorm would stop, or that a stretch or road had not buckled has little effect on meteorological or physical reality. Only the behavior of the driver can be controlled or altered in the course of the pursuit. Therefore, our focus must be on the driver if we wish to effectively reduce exposure.

The available means of reducing EVO exposure are many. Most of us will readily cite training and policy as two principal means of addressing exposure. These measures are the most critical and effective means available to a law enforcement agency to "get hold of" its exposure. In a specific sense, however, training and policy must be agency- and officer-appropriate before they can have any utility for the risk management process. As an example, the term "police driver training" connotes to many officers time spent on the track at high speed, or otherwise getting a "feel for" a police vehicle. However, if an evaluation of pursuit after-action reports shows a trend in which the majority of occurrences relate to controlled intersection collisions, the more appropriate training might be related to officer decision-making as opposed to technical skill development. It is fair to say that the majority of law enforcement officers are relatively proficient technical drivers but could probably benefit from training related to pursuit decision-making. Unfortunately, from a policy standpoint, many agencies are of the opinion that advice to their officers to "use good judgment" and to "comply with state law" in the course of a pursuit is sufficient to control exposure.

As means of exposure reduction, training and policy are the most critical measures available to an agency. Every agency must tailor both policy and training to reflect its actual operational profile and to meet the demonstrated needs of its officers. From a risk management perspective there are no "shortcuts" to effective policy and training. From a pursuit policy development standpoint, there is

a dire need to "cover all bases" to insure that agency guidance to officers addresses each critical component of pursuit operations. Checklists such as the one enclosed in the appendix to this chapter can serve as helpful tools in the drafting of pursuit policy. Failure to accurately identify exposure problems, utilization of untested or unread, "off the shelf" policies, and unquestioned implementation of generic training materials are ingredients for financial disaster. Additionally, there is a critical need to obtain officer input and "buy in" to the agency's pursuit policy, lest it be disregarded as "unrealistic."

Revisiting City of Canton v. Harris

After *City of Canton v. Harris*, municipal law enforcement agency heads and risk managers were effectively put on notice of the grave potential for section 1983 liability for uncontrolled police activities. The "deliberate indifference" standard approved by the US Supreme Court extended an invitation to revisit the inventory of "critical" functions performed by the municipal police agency, and to identify standards for their performance and make provisions for training before the advent of a lawsuit. The message of *Canton* was that management of the risks associated with such critical functions as pursuit is the principal key to achieving the critical balance between enforcement objectives and protection of the community.

Conclusion

Effective front-end risk management, and thus liability reduction, can only come about where there is open and honest communication between those sharing in the risk. Two principal partners in the risk are the governmental entity's risk manager, if in fact there is such a person, and the head of the law enforcement agency involved. Ongoing dialogue between these two key actors should not contain phrases such as "this is strictly a law enforcement matter" from the law enforcement side, or "this is a matter of administrative concern only" from the risk manager or the administration side; or any variation on these themes. The outcome of such dialogue will certainly be an aftermath of finger-pointing and ill-will when pursuit or emergency response claims inevitably come about. The proportional percentage of law enforcement claims to a municipality's overall loss history is generally high. Common sense dictates that identification of the areas where claims are likely to occur will assist in managing them. Support may be required from the administration in funding additional equipment or training needs. Courage will also be required to "fix" observed deficiencies rather than hope that a suit will not come about. The management of EVO risks, whether under section 1983 or conventional state tort action, must be an open dialogue complemented by free exchange of information. The bottom line is that risk management must be a proactive process by which law enforcement identifies the risks of its operations, and then acts upon the identified risks to reduce liability exposure and increase public safety. Ignoring the red flags which signal deliberate indifference is a sure invitation to financial disaster.

State Tort Actions

State Tort Actions can typically be brought against an officer or agency based on allegations of negligence. The legal formula for negligence can be summarized as:

1. A duty or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required; a breach of duty.
3. A reasonably close casual connection between the conduct and the resulting injury. This is known as "legal" or "proximate" cause, and includes the notion of cause in fact.
4. Actual loss or damage resulting to the interests of another.

Negligence In Emergency Vehicle Scenarios

- Negligence in driving situations generally results from one of the following omissions:
  - May result from the violation of a state statute which creates a duty to act or not act.
  - Violation of a department policy which creates a duty to act or not act.
  - Violation of a general duty to use “due care.”

42 USC 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…"

1983

- Creates no rights in and of itself.
- Provides a remedy for violations of rights secured by the Constitution or laws.
- Only has two operative requirements:
  1. That the violation of a federal constitutional or statutory protection occur; and
  2. That the person committing the violation be a person acting "under color of" state law.

Liability Under 1983

1. Individual, or personal, liability of the law enforcement officer.

2. Vicarious, or indirect, liability of a supervisor.

3. Municipal liability.

Constitutional Violations In Emergency Vehicle Operations

Fourth Amendment Claims: *Unreasonable force used to effect seizures*

- Does the fleeing suspect against whom the force is used pose a "significant threat" to members of the public if apprehension is delayed?
- Are there reasonably lesser means available of stopping the flight of the suspect?

Constitutional Violations In Emergency Vehicle Operations

Fourteenth Amendment Claims: *Generally brought by innocent third parties*

- Focus is on constitutional duties, however nonconstitutional (duty created by statute or policy) duties may impact claim.

Vicarious Liability

- A supervisor or other officer cannot, with impunity, allow a subordinate, to whom a duty of supervision is owed, to commit constitutional violations or take a part in the unconstitutional behavior either through direct participation or ratification.

Municipal Liability

- A Municipal entity is not liable for the acts of its officers under 1983 simply because it employs them. The officer's infliction of the constitutional injury must have been in furtherance of the "policy,", "custom," or "practice" of the municipality.

Risk Management

Definition and Benefit

- Taking appropriate precautions before embarking on potentially hazardous assignments.
- The goal is to accurately and prospectively ***identify potential hazards***, prior to their occurrence, and then put reasonable and cost-effective, protective measures into place to ***prevent the hazards from becoming actual occurrences***.

Risk Management

Basic Principles

1. Identify the hazards or potential hazards which face an organization.
2. Determine means of reducing the identified exposures to risk.
3. Implement measures for reduction of exposures to risk.
4. Monitor the effectiveness of the reduction measures and change as necessary.